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U.S. Citizenship
and Immigration
Services

B6

FILE:

WAC 03 306 54550

Office: CALIFORNIA SERVICE CENTER

Date: **DEC 29 2004**

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10(a), commonly referred to as Schedule A. The director determined that the petitioner had not established that the beneficiary met the qualifications for Schedule A designation and denied the petition accordingly.

On appeal, counsel submits a brief.

Section 203(b)(3) of the Act states, in pertinent part:

(A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Furthermore, 8 CFR § 204.5(l)(3)(ii)(B) states, in pertinent part:

Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 20 C.F.R. § 656.10(a)(2) states that professional nurses are among those qualified for Schedule A designation, if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22 [Applications for labor certification for Schedule A occupations.] (c)(2) states,

An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

In a memo dated December 20, 2002, the Office of Adjudications of the INS, now CIS, issued a memo instructing Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state *in lieu* of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

Eligibility in this matter hinges on the petitioner demonstrating that, on the filing date of the petition, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition was filed on November 14, 2002. The petitioner must demonstrate that, as of November 14, 2002, the beneficiary possessed the qualifications imposed by the regulations.

With the petition counsel submitted a California interim permit to practice nursing. That permit, issued July 2, 2002, authorizes the beneficiary to practice nursing under the direct supervision of a registered nurse pending issuance of a license following examination. Counsel also submitted a letter, dated March 20, 2002, from the California Board of Registered Nursing, stating that the beneficiary was found to be eligible to take the NCLEX-RN examination.

On March 31, 2003, the California Service Center requested additional evidence. Specifically, the Service Center requested evidence that the beneficiary had either (1) passed the CGFNS examination, (2) passed the NCLEX-RN examination, or (3) been issued a full and unrestricted (permanent) license to practice nursing in California, the state of intended employment.

In response counsel submitted a copy of an engraved certification showing the beneficiary is licensed to practice nursing in California. That notice was issued on February 20, 2003.

On April 22, 2003, the California Service Center issued another Request for Evidence in this matter. The Service Center noted that the beneficiary's California nursing license shows that it was issued during February of 2003, but that the petitioner is obliged to demonstrate that the beneficiary was eligible for the position on November 14, 2002, the date the Form I-140 petition was filed. The Service Center requested evidence that, as of November 14, 2002, the beneficiary had either (1) passed the CGFNS examination, (2) passed the NCLEX-RN examination, or (3) been issued a full and unrestricted (permanent) license to practice nursing in California, the state of intended employment.

In response, counsel submitted an undated copy of a letter from the California Board of Registered Nurses stating that the petitioner had completed the requirements for licensure. That letter states that it was issued contemporaneously with the beneficiary's engraved certificate, which, as was stated above, was issued on February 20, 2003. In a letter dated April 30, 2003, counsel argued that the evidence demonstrates that the beneficiary is fully qualified for the proffered position.

The director determined that the evidence submitted did not demonstrate the beneficiary's eligibility for the Schedule A designation on the date the petition was filed and denied the petition on June 6, 2003.

On appeal, counsel asserts that the petitioner has established that the beneficiary was eligible on the filing date. In support of that proposition, counsel cites the beneficiary's interim California permit to practice nursing. Counsel stated that, in this situation, deference to California law is indicated. Counsel also argued that the petition should be approved because there is a shortage of nurses in the United States.

Counsel is correct that the United States has a shortage of nurses. That generalized shortage has caused the Department of Labor to place nurses on the list of Schedule A occupations. That is not, however, a forceful argument for ignoring the statutes and regulations pertinent to Schedule A occupations. To the contrary, it is a clear indication that those statutes and regulations apply.

The petitioner is obliged, therefore, to demonstrate either that, on the date the petition was filed, the beneficiary had either (1) passed the CGFNS examination, (2) passed the NCLEX-RN examination, or (3) been issued a full and unrestricted (permanent) license to practice nursing in California, the state of intended employment.

Counsel stresses the beneficiary's interim license as evidence of her qualifications under the regulations. The beneficiary's interim license, however, as the name implies, is not a permanent license, as 20 C.F.R. § 656.22 requires. Further, as by its very terms the beneficiary must be supervised by a registered nurse, it is not unrestricted, as 20 C.F.R. § 656.22 also requires.

Counsel's argument pertinent to the supremacy of California law is inapposite. No conflict of laws appears in this case. California law does not indicate that the beneficiary, on the date the petition was filed, had a full and unrestricted license to practice nursing in that state.

The petitioner has provided no evidence that the beneficiary had a full and unrestricted license to practice nursing in California, the state of intended employment, on the date the petition was filed. The petitioner has provided no evidence that the beneficiary had passed the CGFNS or NCLEX-RN examination on that date. Thus, the petitioner has not proven that the beneficiary is qualified for the proffered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.